IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

WA.No. 2697 of 2007()

(AGAINST THE ORDER DT. 19.10.2007 IN W.P.(C) NO.28311/2007)

APPELLANT: RESPONDENT NO. 4 IN WPC

THE INSPECTOR GENERAL OF POLICE,
NORTHERN RANGE, KERALA STATE.

BY ADVOCATE GENERALSRI.C.P.SUDHAKARA PRASAD

RESPONDENTS: PETITIONERS & RESPONDENTS 1 TO 3 AND 5 TO 8 IN WPC
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1. M.V.RAGHAVAN (MEMBERSHIP NO.1)
FORMER MINISTER FOR CO-OPERATION AND PORTS,
GOVERNMENT OF KERALA,RESIDING AT MELATHIL VEETTIL
BURNASSERRY, KANNUR.

2. C.T.AHAMMEDALI (MEMBERSHIP NO.187)
FORMER MINISTER ,STATE OF KERALA
C/O.MUSLIM LEAGUE COMMITTEE OFFICE,
KASARAGOD.

3. PATIYAM RAJAN (MEMBERSHIP NO.9)
FORMER MEMBER OF PARLIAMENT,
PATHAYAKUNNU P.O.,THALASSERY,KANNUR.

4. SUMA BALAKRISHNAN (MEMBERSHIP NO.486)
KUSUMAN,KAPPAD P.O., KANNUR.

5. P.P.LAKSHMANAN, (MEMBERSHIP NO.168)
ROHINI, KANNUR.

6. THE RETRUNING OFFICER,
ASSISTANT REGISTRAR (PLANNING)
KERALA STATE CO-OP.HOSPITAL COMPLEX AND CENTRE
FOR ADVANCED MEDICAL SERVICES LTD.NO.4386,
PARIYARAM,KANNUR.

7. THE DISTRICT COLLECTOR,KANNUR.

8. THE KERALA STATE CO-OP.HOSPITAL COMPLEX

AND CENTRE FOR ADVANCED MEDICAL SERVICES LTD.NO.4386,PARIYARAM,KANNUR,REPRESENTED BY ITS MANAGING DIRECTOR.

9. T.K.GOVINDAN, CHAIRMAN,
KERALA STATE CO-OP.HOSPITAL COMPLEX AND CENTRE FOR ADVANCED MEDICAL SERVICES LTD NO.4386, PARIYARAM,KANNUR.

10. T.KUMARAN,
MEMBER,MANAGING COMMITTEE OF
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11. S.V.G.PADMANABHAN,
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21. M.NARYANAN,
MEMBER,MANAGING COMMITTEE OF
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AND CENTRE FOR ADVANCED MEDICAL SERVICES
LTD.NO. 4386,PARIYARAM,KANNUR.

22. K.M.ASHRAF,
MEMBER,MANAGING COMMITTEE OF
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LTD.NO. 4386,PARIYARAM,KANNUR.

BY ADV. SRI. B.S.SWATHY KUMAR
SRI. M.SASINDRAN
SRI. P.V.SURENDRANATH

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 27/11/2007 ALONG WITH W.A.NOS.2700, 2706 & 2707/2007, THE COURT ON 30/11/2007 DELIVERED THE FOLLOWING:

K.BALAKRISHNAN NAIR & K.P.BALACHANDRAN, JJ.

W.A. NOS. 2697, 2700, 2706 & 2707 OF 2007

Dated 30th November, 2007.

JUDGMENT

Balakrishnan Nair, J.

W.A.No.2700/2007:

The appellant is the 3rd respondent in the writ petition. The writ petition was filed under Article 226 of the Constitution of India, challenging the validity of the election held on 23.9.2007 to the Managing Committee of the 5th respondent Co-operative Society. The appellant is one of the returned candidates. This Court admitted the writ petition and ordered notice on the respondents. This Court also passed an interim order restraining the newly elected Managing Committee from enrolling new members and also from making appointment of any employees. The appellant filed a counter affidavit, raising a preliminary objection that the writ petition is not maintainable under Article 226 of the Constitution of India. He submitted that the Co-operative Societies Act is a self-contained code. It provides for an effective alternative machinery for resolution of election disputes. Further, it was also contended that as the disputes raised in this writ petition mainly fall within the realm of disputed questions of

fact, the writ petition should be dismissed and the writ petitioners should be turned away to invoke the statutory remedy available to them. The appellant also prayed for vacating the interim order. But, the learned Single Judge overruled the objections raised on behalf of the appellant regarding the maintainability of the writ petition. The interim order was modified and it was ordered that if there is any urgent necessity for making appointment of employees in the Society, the respondents in the writ petition can move for permission of the Court to effect appointments. Feeling aggrieved by the said order dated 19.10.2007, this writ appeal is filed.

2. Sri.T.P.Kelu Nambiar, learned senior counsel appearing for the appellant submitted that the impugned order is an order, adversely affecting the interest of the appellant and therefore, it is appealable under Section 5(i) of the Kerala High Court Act. Reference was made to the principles laid down by this Court in **K.S.Das v. State of Kerala** [1992(2) KLT 358 (FB)]. The relevant portion of the said Judgment, relied on by the learned senior counsel reads as follows:

> "Conclusion:(1) The word 'order' in S.5(1) of the Kerala High Court Act, 1958 includes, apart from other orders, orders passed by the High Court in Miscellaneous Petitions filed in the Writ Petitions provided the orders are to be in force pending the Writ Petition. An appeal would lie against such

> orders only if the orders substantially affect or touch upon the substantial rights or liabilities of the parties or are matters of moment and cause substantial prejudice to the parties. The nature of the 'order' appealable belongs to the category of 'intermediate orders' referred to by the Supreme Court in *Madhu Limaye*'s case AIR 1978 SC 47. The word 'order' is not confined to 'final order' which disposes of the Writ Petition. The 'orders' should not, however, be ad-interim orders in force pending the Miscellaneous Petition or orders merely of a procedural nature."

The learned senior counsel also took us through the decision in **K.K.Shrivastava v. B.K.Jain** (AIR 1977 SC 1703) and contended that in view of the principles laid down therein by the Apex Court, the writ petition was liable to be dismissed. Special reference was made to para 4 of the said Judgment, which reads as follows:

> "It is well settled law that while Art. 226 of the Constitution confers a wide power on the High Court, there are equally well settled limitations which this Court has repeatedly pointed out on the exercise of such power. One of them which is relevant for the present case is that where there is an appropriate or equally efficacious remedy the Court should keep its hands off. This is more particularly so where the dispute relates to an election. Still more so where there is a statutorily prescribed remedy which almost reads in mandatory terms. While we need not in this case go to the extent of stating that if there are exceptional or extraordinary circumstances, the Court should still refuse to entertain a writ petition, it is perfectly clear that merely because the challenge is to a plurality of returns of elections, therefore a writ petition will lie, is a fallacious argument. It is important to notice what the High Court has overlooked is that the period of limitation prescribed by the rules is 15 days and if writ petitions are to be entertained long afterwards, it will stultify

> the statutory provision. Again in the present case an election petition covering the same subject-matter is actually pending. There is no foundation whatever for thinking that where the challenge is to an 'entire election' then the writ jurisdiction springs into action. On the other hand, the circumstances of this case convince us that exercise of the power under Art.226 may be described as mis-exercise. It is unfortunate that an election petition, which probably might have been disposed of long ago, is still pending because the writ petition was pending in the High Court and later on special leave having been granted these appeals have been pending in this Court. How injurious sometimes the repercussions of entertaining writ petitions are where they should not be is illustrated by this very case."

The learned senior counsel also brought to our notice the decision of the Apex Court in **Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra** [(2001)8 SCC 509]. The relevant portion of the said judgment relied on by the learned senior counsel reads as follows:

> "12. In view of our finding that preparation of the electoral roll being an intermediate stage in the process of election of the Managing Committee of a specified society and the election process having been set in motion, it is well settled that the High Court should not stay the continuation of the election process even though there may be some alleged illegality or breach of rules while preparing the electoral roll. It is not disputed that the election in question has already been held and the result thereof has been stayed by an order of this Court, and once the result of the election is declared, it would be open to the appellants to challenge the election of the returned candidate, if aggrieved, by means of an election petition before the Election Tribunal.

> 13. In that view of the matter, we are in agreement with the view taken by the High Court that the appellants having an alternative remedy, the writ petition deserved dismissal."

3. The learned senior counsel Mr.Kelu Nambiar took us through the findings in the impugned order regarding the merits of the case. Though, the word "prima facie" is used when stating those findings, it is submitted that they will prejudice the appellant at the time of final hearing. The appellant is being harassed by compelling him to face the trial of a writ petition, which is, ex facie, not maintainable, it is contended. He pointed out that the writ petitioners have a right to move the Co-operative Arbitration Court, challenging the election and if they are dissatisfied with the decision of the said court, they have a right of appeal to the Kerala Co-operative Tribunal, which is manned by a District Judge. In view of the alternative and efficacious remedy available to them, the writ petition should not have been entertained, it is submitted. Therefore, the learned senior counsel prayed for allowing the appeal.

4. We heard the learned counsel appearing for the appellants in the connected Writ Appeals, including the learned senior counsel Sri.M.K.Damodaran.

5. We also heard M/s.George Poonthottam and B.S.Swathikumar, learned counsel, who appeared for the respondents in the appeal.

6. It is fairly well settled that if a learned Single Judge of this Court dismisses a writ petition at the threshold, on the ground that the petitioner has an alternative statutory remedy, normally, the Division Bench will not interfere with the same in a Writ Appeal filed under Section 5 of the Kerala High Court Act, unless it is shown that the exercise of the discretion made by the learned Single Judge was perverse or arbitrary. In this case, we obtain the converse position. In other words, the learned Single Judge has decided to exercise the jurisdiction under Article 226 of the Constitution of India. That is mainly under challenge in this appeal.

7. The impugned order dated 19.10.2007 contains two parts. The restriction regarding the enrolment of members and appointment of fresh employees, is an order passed on the interim relief sought, in the discretion of the learned Single Judge, having regard to the principles of balance of convenience. In **K.S.Das v. State of Kerala** (supra), this Court held:

> "Normally, discretionary orders are not interfered with unless the impugned orders are without jurisdiction, contrary to law, or are perverse, and they also cause serious prejudice to the parties in such a manner that it might be difficult to restore the status quo ante or grant adequate compensation."

In the light of the above decision, there is nothing wrong with the said

interim order, warranting interference in this appeal. As noticed earlier, the learned Single Judge has himself given liberty to the Managing Committee to move for modification of the order, if it is necessary to make any appointment. So, we are not inclined to interfere with the said part of the order.

8. The appellant seriously challenged that part of the impugned order, by which the preliminary objection regarding the maintainability of the writ petition was overruled. We feel that the said part of the order is not an appealable order in terms of Section 5(i) of the Kerala High Court Act, which reads as follows:

> "5. Appeal from judgment or order of Single Judge:--An appeal shall lie to a Bench of two Judges from--
>
> (i) a judgment or order of a Single Judge in the exercise of original jurisdiction; or ....."

For an order to be appealable under Section 5, it must substantially affect or touch upon the rights or liabilities of the appellant. Further, it must be an order of moment causing substantial prejudice to him, going by the conclusions laid down in the decision of this Court in **K.S. Das'**s case [1992 (2) KLT 358 (FB)]. The learned Single Judge only overruled the contentions regarding the maintainability of the writ petition. The same

cannot be treated as an appealable order. This view is supported by the above mentioned five Judges' Bench decision in **K.S.Das v. State of Kerala**. Jagannadha Rao, C.J. (as His Lordship then was), in His Lordship's leading judgment held as follows:

> "In our view, the word 'order' under S.5(i) cannot be equated to any order, as wide as the one in Art.136. If such a wide construction is to be adopted, it might, as contended for the respondents, lead to several absurd or incongruous results. An 'order' obviously cannot include mere procedural orders of adjournment, admission of writ, summoning of documents or witnesses, or directing local inspection etc., which orders do not seriously affect the rights of the parties. Therefore, as contended for the respondents, the 'literal construction' test fails for, the Legislature, in our view, never used the word 'order' in such an extremely wide sense." (Emphasis supplied)

The above quoted view of the learned Chief Justice is supported by three more of the five learned Judges, who constituted the Bench. Paripoornan, J. (as His Lordship then was), who penned the dissenting judgment, held that no appeal will lie against any interim order. So, the above quoted view is supported by the said learned Judge also. The appellant, in fact, challenges the decision of the learned Single Judge to admit the writ petition and issue notice to the respondents. Though the appellant pointed out that the writ petition should not have been admitted and it should have been dismissed in limine, by raising a preliminary objection, the said objection was overruled.

The learned Judge took the stand that the order passed by him for issuing notice in the writ petition is correct. Such an order, in the light of the above authoritative pronouncement, is not one against which an appeal will lie under Section 5(i) of the Kerala High Court Act. Therefore, according to us, the Writ Appeal is not maintainable and therefore, the same fails.

9. But, we notice that the findings of the learned Single Judge rendered in the impugned order are only prima facie findings. No Judge or Court will be bound by the prima facie findings entered at the preliminary or interlocutory stage, when finally deciding the case, in the light of the evidence and materials before him/it. Even if, prima facie, a Judge has felt that the writ petition is maintainable, nothing prevents him from finally dismissing the writ petition, turning the writ petitioners away, taking note of the statutory remedy available to them. The dismissal of this Writ Appeal will not affect the inherent powers of the Single Judge in this regard. If ultimately, the final order in the writ petition goes against the appellant, while challenging the same in Writ Appeal, he can also canvass the correctness of the decision of the learned Single Judge in entertaining the writ petition, without turning away the writ petitioners to invoke the statutory remedy available to them. In view of the above position, the Writ Appeal is dismissed.

W.A.Nos.2706 & 2707/2007:

10. The point raised by the appellants in these appeals is covered by the judgment in W.A.No.2700/2007. Accordingly, these Writ Appeals are also dismissed.

W.A.No.2697/2007:

11. This Writ Appeal is filed by the Inspector General of Police, Northern Range, Kerala State, who is the 4th respondent in the writ petition. The appellant feels aggrieved by certain observations made in the impugned order by the learned Single Judge against the police. The learned Advocate General Sri.C.P.Sudhakara Prasad, who appeared for the appellant, prayed for expunging those adverse remarks. We notice that they are all prima facie observations made against the police and therefore, our observations concerning similar prima facie findings in W.A.No.2700/2007 will govern this case also. Accordingly, this Writ Appeal is also dismissed.

K.BALAKRISHNAN NAIR, JUDGE.

K.P.BALACHANDRAN, JUDGE.

Nm/